

**GOVERNMENTAL ADVISORY COMMITTEE
TO THE U.S. REPRESENTATIVE TO THE
NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION**

November 24, 1997

Honorable Carol M. Browner
Administrator
U.S. Environmental Protection Agency
401 M Street S.W.
Washington, DC 20460

Dear Ms. Browner:

Following is the report of the seventh meeting of the Governmental Advisory Committee to the U.S. Representative to the North American Commission for Environmental Cooperation (CEC). The Committee met October 30-31, 1997, at Alexandria, Virginia, in conjunction with its counterpart National Advisory Committee.

We wish to thank Bill Nitze and Serena Wilson, and CEC Directors Janine Ferretti and Greg Block for their ongoing assistance to the committee.

The committee focused its efforts in several areas: evaluation of the North American Fund for Environmental Cooperation (NAFEC), revision of Article 14-15 citizen submission guidelines, development of Part V dispute resolution procedures, further implementation of the Sound Management of Chemicals project, the CEC annual work program, especially related to expanding work on trade and environment, and evaluation of overall implementation of the side agreement.

North American Fund for Environmental Cooperation (NAFEC)

The Committee has been following the implementation of the Fund since its inception. We have recently reviewed the NAFEC projects awarded to date and have several concerns. While the Fund was expected to support constituency building and program support objectives, we do not believe many of the projects have a clear link to the CEC program, and we question whether NAFEC is an effective vehicle to build constituency for the CEC. Given that the Secretariat's budget is unlikely to increase, we also are concerned that this program is taking an inordinate amount of resources away from direct program support. We urge that the parties and the CEC reexamine the continuing relevance of NAFEC to its objectives and express our support for reducing or eliminating the NAFEC budget so that resources may be shifted to work which is central to the CEC's mission.

If the parties decide that NAFEC should continue, we urge that grants be focused solely on core functions of the CEC and that NAFEC projects provide direct support to the CEC work program, including trade and environment projects. We also urge that NAFEC itself, and the projects it supports, attempt to engage all key stakeholders, including state and local

governments and tribes, as well as nongovernmental organizations. Reiterating previous recommendations, we continue to urge that greater efforts be made to attract funding from industry, foundations and other sources to replace and/or leverage CEC funds for NAFEC and other projects.

Budget

The Committee anticipates receiving the Secretariat's proposed 1998 work program within the next few weeks. After we have reviewed the proposals, we will provide further comments on project and budget tradeoffs and trade-and-environment initiatives, responding to the Council's direction, in the context of specific proposed projects.

As a general comment, we believe that the budget should be committed to essential CEC functions and that discretionary opportunities should be supported only if funds are available. In this context, we believe that funds must be allocated to assure that the Secretariat can effectively deal with Article 14 and 15 citizen submissions; given their increasing experience, we believe that staff should be able to budget for processing reasonably anticipated submissions. We also feel that Article 13 studies have real value and urge that the CEC budget for two studies per year. Again, we emphasize that the budget for Article 13 studies must contain adequate resources to assist involvement of appropriate stakeholders in study design and implementation as well as to produce a high quality technical product.

Although we are very concerned with the limits on CEC funding and continue to urge increased assistance by the governments, we also recognize the importance of parity of support to its activities. We agree that governments should continue to provide equal contributions. Reiterating our recommendation above, we also continue to recommend that greater efforts be made to attract funding from other private sources and to increase efforts to leverage CEC project funding.

Transboundary Environmental Impact Assessments (TEIA)

The committee was asked to comment on the likelihood that border states will agree to join and be bound by the recently concluded agreement among the national parties.

The committee expressed strong support for reaching agreements with and between all border states to notify each other and to extend stakeholder participation in these processes as well. The committee also urges consultation with border tribes to discuss how to involve them in these processes with national governments and states.

We believe that each state must decide on its own if it will participate in TEIA. While we understand that there is a desire to provide for notification and cooperation in as many situations as possible, there was general agreement that states will agree to participate only with respect to significant actions; there is no need for states to waste resources providing notices of routine minor permits or projects that may occur in the border regions but that have no significance to adjacent jurisdictions. Members also noted that there are already a number

of voluntary, binational transboundary cooperation and notification programs. Although these arrangements do not provide universal coverage, the committee urges the U.S. and CEC to review existing state-to-state and transboundary processes to see how they might be leveraged. It was noted that the U.S.-Mexico border region states will meet soon binationally to discuss this.

NAFTA Effects Project/Sector Studies

The Committee continues to urge the CEC to study NAFTA transportation effects at both borders and to continue its work on utility deregulation impacts following on from the recently completed sector study. We appreciate U.S. support for previous recommendations on addressing these sectors reflected in the response to our last report. We were advised at the meeting that there has been some limited work on transportation issues in the I-35 corridor as part of the Air Monitoring and Modeling Study.

The committee believes that the three recently completed sector studies should be published as soon as they have been approved. As a general comment, we believe that all of the products produced by the Secretariat should be distributed and publicly available.

Sound Management of Chemicals Project

Members expressed very strong concerns with the inadequacies of the recently published North American Regional Action Plan (NARAP) for mercury and the resulting 18 month delay in implementation. The committee believes that a major portion of the Phase I problems are attributable to the failure of the work group to involve key people outside the federal government and the failure of the work group to build on existing studies and institutional efforts especially in the Midwest and eastern U.S. The committee hopes that the Phase II process will be better managed and that the product will be useful.

For the future, the committee urges EPA to set more specific criteria for selecting work group members in order to identify and assure involvement by the most appropriate policy and technical experts in the issues. While the work group members should have responsibilities for coordinating with other governmental, industry and nongovernmental stakeholders, the work group members should not presume to fully represent the views of the states and other external experts. The U.S. government and the CEC should work with and through key associations in the U.S. and other countries to access the most appropriate people. The committee offers its help in reaching state, local and tribal government organizations.

The committee intends to comment on CEC criteria work group recommendations regarding the next three chemicals that have been proposed for phaseout, following consultation with staff. The members recommend that the Council consider broadening its selection criteria to permit work on chemicals that are not on the "dirty dozen" list, but represent critical North American issues such as NO_x, acid rain and particulates. The committee endorses recommendations contained in the Continental Pollutant Pathways report to conduct multimedia studies of source categories, especially transportation and electricity

generating utilities, in order to help set priorities for action.

Confidentiality

Despite commitments by members to maintain confidentiality and long-term efforts to reach agreement with EPA legal staff on an approach that would permit working group review of the negotiating texts, the committee was not permitted to review the actual texts. Alternatively, agency staff identified several issues of concern to the government that were discussed by the committee; comments on these issues follow. The committee strongly urges that a process be negotiated that will protect U.S. interests but that also will permit the committee to identify its own issues as well and to participate more effectively in the development of U.S. policy on key issues.

Party-to-Party Dispute Resolution Rules

While we recognize that party-to-party disputes reflect a higher level of concern and sensitivity by the parties, we urge that the process operate as openly as possible. In that light, we recommend that witnesses be allowed to participate in hearings, that the hearings be open, and that the hearing record be published. We also see value in providing for designation of alternate panelist(s) to assure that a hearing can continue if a primary panelist becomes unable to continue.

Article 14-15 Citizen Submission Guidelines

Although the committee has expressed its view several times that the current guidelines have been working well and do not require immediate changes, it has been made clear to us that some changes are inevitable. As reflected in the comments which follow, the committee opposes any changes that would weaken citizen access or the independence of the Secretariat.

The committee opposes incorporation of any language that would require the Secretariat to inform the Council of its actions and rationale in any greater detail or frequency than they do currently. The committee also opposes new requirements that a submitter document actual harm to the environment or a link to trade impacts, or that would require a submitter to cite the specific section of law that is the subject of the allegations. Each of these latter ideas would make it much more difficult for a submission to proceed, resulting in a great cost in credibility of the NAFTA side agreement, the CEC and the governments. The committee also did not perceive the need to establish more specific criteria to be applied by the Secretariat in deciding whether to prepare a Factual Record. Given the wide variety of issues and facts presented in submissions, the committee believes that the Secretariat needs the authority to apply the informed discretion that has been evident so far.

With respect to a possible alternate process involving consultation between a party and submitter, the committee supports this as an option that could result in time and cost savings, but not as a requirement. If this consultation approach became an option in the guidelines, the committee supports development of threshold criteria to help assure serious efforts by the

submitter and the Party to resolve the issues. If both parties were to agree to an alternate process, the committee suggests that the process include requirements that a submitter send the Secretariat a formal notice of intent to file an Article 14 submission, and that the Secretariat make direct contact with both parties to verify that each party's representative was authorized to make binding commitments, that there is an agreed firm deadline for reaching informal resolution, and that serious negotiations were underway. The Secretariat, or another objective organization that offers dispute resolution assistance, could also participate in a mediation role.

The committee discussed, but did not make a recommendation related to termination of work on a submission if the Secretariat is advised that the issues are being considered in court. The committee agreed that the issues are too complex to make a blanket statement.

The committee appreciates U.S. adoption of its July recommendations, reflected in Mr. Nitze's response to the committee, concerning a submitter's right to withdraw after processing by the Secretariat has been initiated and linkages between Article 13, 14 and 15 processes. We accept the response to our recommendation regarding notification by the Secretariat to affected stakeholders in advance of a decision to proceed with an Article 13 study, but trust that the U.S. government itself will notify U.S. stakeholders and offer to involve them in an Article 13 study as soon as a decision is made to proceed.

Reiterating a recommendation in our previous report, the members feel the committee needs to meet more frequently, i.e., at least three times a year, to address the number and level of detail of issues in our charge. We understand that this recommendation is still being considered in light of its potential resource impacts, but again urge your favorable consideration.

Finally, as I leave the chair and the Committee, I personally want to express how much I have enjoyed my work with the committee and the staff over the past three years. In particular, Bob Hardaker and his staff have been invaluable in providing timely information, background material and insight that have allowed the committee to make useful and informed recommendations. I leave with a very positive feeling that the committee has contributed significantly to the development of a unique and vital process for addressing environmental issues throughout North America and thank you for the opportunity to participate.

Sincerely,

Ann Glumac
Chair